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Analysis

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The Alleged Incapacities of Mr Sheridan

On 26 January 2011 the former Scottish Socialist Party MSP Tommy Sheridan was sentenced to three years' imprisonment for perjury.¹ As a consequence was Mr Sheridan disqualified from membership of Parliament by virtue of his conviction, or by virtue of his imprisonment? Or neither? If disqualified, for how long? And from which Parliament? Was there any prospect of his being a candidate in the 2011 Scottish Parliament elections, due to take place a matter of months after sentencing? In attempting to answer such questions the BBC reported that as a consequence of his conviction Sheridan "won't be able to stand for the Scottish Parliament again"² whilst *The Guardian* claimed that "Sheridan's conviction means that he will be unable to stand again for parliament".³ Neither statement is correct and after (though not necessarily because of) emails from this author, the BBC withdrew the claim from subsequent broadcasts and *The Guardian* website's "article history" shows that a similar modification was made to their story. What then are the relevant rules of electoral law, how do they apply to Mr Sheridan's circumstances and why are they so poorly understood?

A. THE RULES

Assuming no incapacity based on age or nationality,⁴ the starting point for determining whether an individual lacks capacity to stand as a candidate at an election is the House of Commons Disqualification Act 1975. As is well known, this provides for the disqualification of certain serving public officials – judges, civil servants, members of the police and armed forces, etc⁵ – from membership of the Commons and, by virtue of the Scotland Act 1998, the Scottish Parliament.⁶ Clearly

1 For the sentencing statement of Lord Bracadale, presiding, see <http://www.scotland-judiciary.org.uk/8/709/HMA-v-THOMAS-SHERIDAN>.

2 BBC Radio 4, *The World At One*, 26 Jan 2011.

3 "Tommy Sheridan sentenced to three years in prison", *The Guardian* 26 Jan 2011.

4 Electoral Administration Act 2006 Part 5.

5 The "disqualifying offices" listed in Schedule 1 of the Act are regularly amended by Order in Council.

6 "A person is disqualified from being a member of the [Scottish] Parliament if ... he is disqualified ... from being a member of the House of Commons or from sitting and voting in it." Scotland Act 1998 s 15(1)(b).

however, none of these disqualifications would apply to Mr Sheridan. We must look elsewhere to determine his alleged incapacity.

Further light may be thrown on the matter by reference to the great consolidating measure of UK electoral law, the Representation of the People Act 1983.⁷ In reproducing the electoral offences first introduced by the Corrupt and Illegal Practices Act 1883, it provides for a further category of the disqualified—those convicted of “corrupt or illegal practices”. Corrupt practices are intentional crimes such as personation,⁸ bribery,⁹ treating¹⁰ and unduly influencing others in the manner of their voting¹¹ whilst illegal practices do not require *mens rea* and include voting illegally,¹² false statements as to candidates,¹³ disrupting election meetings¹⁴ and illegal practices in relation to election expenses.¹⁵ As arcane and diverse as this list may be, it does not include the offence of perjury. The plain and ordinary meaning of “corrupt or illegal practices” is trumped by the statute’s use of it as a term of art. As such Mr Sheridan suffers no incapacity under the 1983 Act, though were he so to do it would extend up to ten years.¹⁶

Oddly, it is neither the general law pertaining to MPs or elections that determines in the first instance whether Mr Sheridan has capacity to stand in the forthcoming Scottish Parliament elections. Instead one of the more *ad hoc* and *ad hominem* of statutes determines his near-term fate—the Representation of the People Act 1981. The briefest of Acts, this was the UK state’s response to the successful election of the Irish Republican prisoner, Bobby Sands, to the seat of Fermanagh and South Tyrone at a by-election in 1981 on an extraordinary turnout of 86.9%. An outraged Westminster Parliament legislated with great speed to the effect that a “person found guilty of one or more offences . . . and sentenced or ordered to be imprisoned or detained indefinitely or for more than one year, shall be disqualified for membership of the House of Commons while detained anywhere in the British Islands”.¹⁷

7 “The Representation of the People Act 1983 consolidates the Representation of the People Act 1949 and various enactments amending it. That Act of 1949 was itself a consolidation of earlier legislation. A consolidation cannot alter the substance of the earlier law. Accordingly much of the 1983 Act derives from legislation enacted in the nineteenth century.” R J Clayton (ed), *Parker’s Law and Conduct of Elections*, 2nd edn (1996) volume 1, paragraph 1.2.

8 Representation of the People Act 1983 s 60.

9 s 113.

10 s 114. Treating consists of providing “any meat, drink [or] entertainment” to others for the purpose of influencing their vote.

11 s 115.

12 s 61.

13 s 106. For a recent and rare determination of an election being void following in breach of this provision, see *Watkins v Woolas* [2010] EWHC 2702 (QB).

14 s 92.

15 s 73(6).

16 s 159. The Election Court in *Watkins v Woolas* disqualified Mr Woolas for three years, a decision upheld on appeal: [2010] EWHC 3169 (Admin).

17 Representation of the People Act 1981 s 1. See also the discussion in B Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (2010) 308-309.

This then is a basis on which Sheridan will likely be excluded from standing in the Scottish Parliament elections of 2011. Having been sentenced for three years imprisonment and even taking account of the possibility of early release, Mr Sheridan will be disqualified from standing for parliamentary election (Holyrood included)¹⁸ until release. This does not of course guarantee Sheridan's exclusion from the Fourth Scottish Parliament—a by-election after his release could provide the necessary opportunity—but at present, the effect of disqualification would be to void any nomination of him as a member of the House whilst imprisoned.¹⁹

There remains though a further ground for incapacity that, at the time of writing, very much hangs above Sheridan's head—that relating to bankruptcy. The Sheridan trial was prompted by the *News of the World* newspaper alleging certain details about Mr Sheridan's private life. This led him to raise an action for defamation against the newspaper which, whilst initially successful, is at present being appealed. If successful, the *News of the World* will seek to recover its expenses. It is unclear whether Mr Sheridan would have the funds to meet what is certain to be a six figure claim, a likely consequence of which would be his sequestration. In that event a shift to electoral law's interstice with the law of insolvency is necessary. The Enterprise Act 2002 amended the Insolvency Act 1986 such that “[w]here a court in . . . Scotland awards sequestration of an individual's estate, the individual is disqualified . . . for being elected to, or sitting or voting in, the House of Commons”.²⁰ As this provision has parallel effect for the Scottish Parliament,²¹ there is the very real possibility of Mr Sheridan being disqualified in the event of an adverse expenses order arising from the initial defamation action leading to his sequestration. The irony of the law of capitalism determining the law of democracy would not be one lost on Mr Sheridan. Any such disqualification would commence at the date of sequestration and expire at its discharge, which in the ordinary run of affairs would be after one year.²² The exact timing of that sequence is at present unclear as Mr Sheridan's appeal against the perjury conviction has sisted the *News of the World's* own appeal against the original defamation decision, thereby delaying any sequestration for an indeterminate period.

B. CONCLUSION

This brief tour of the highways and byways of electoral law leads to the obvious point that this is a highly fragmented body of law. That may be a matter of little concern to that discrete and expert community of electoral lawyers and officials but the obscurity

18 (n.6).

19 Representation of the People Act 1981 s 2. In the original case, the 1981 Act had the effect of barring Sands' fellow 'dirty protesters' from standing in the by-election that followed his hunger-strike-induced death twenty six days after his own election to the Commons.

20 Insolvency Act 1986 s 427.

21 (n.6).

22 Section 1 of the Bankruptcy and Diligence etc (Scotland) Act 2007 amends s 54(1) of the Bankruptcy (Scotland) Act 1985 by reducing the period of automatic discharge of the debtor from three years to one.

of the regime has implications for the media's and therefore the electorate's ability to comprehend a body of law that is *eo ipso* of central public concern. Current electoral law resembles the state of its cousin, party finance law, prior its modernisation and systematisation in the form of the Political Parties Elections and Referendums Act 2000. Whatever that measure's other substantive merits it has lent a degree of coherence and clarity to the law of party funding. Increased media and perhaps even popular understanding of the general principles has followed. Would that the same could be said of electoral law. It is not an insignificant paradox that the law governing the electorate's choice of its representatives is almost entirely unknown to it, and practically unknowable.

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(The author thanks the blogger, Lallands Peat Worrier – <http://lallandspeatworrier.blogspot.com/> – for the enquiry that prompted this note.)